FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 20 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949

No. 693

SAFEWAY STORES, INC., a Corporation,
Petitioner,

v.

ELIZABETH WEST, VESTER WEST,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

INDEX

	PAGE
Petition	1
Summary Statement of Matter Involved	2
The Basis of the Court's Jurisdiction	7
Questions Presented	8
Reasons Relied Upon for the Allowance of the Writ	8
Brief in Support of Petition	11
Opinion of the Court Below	11
Specification of Errors	11
Argument	12
The United States Court of Appeals for the District of Columbia Misconceived the Law of Res Ipsa Loquitur as Stated in the Applicable Decisions of this Court and Misapplied That Law to the Facts in This Case	12
The Doctrine of Res Ipsa Loquitur is Not Applicable When the Negligence is Known	15
The Instrumentality Causing the Injury Was Not in the Exclusive Control of Defendant	18
The Instrumentality Causing Injury Could Have Caused the Injury Without Negligence of the Defendant	18
The Rules of Civil Procedure for the District Courts of the United States Do Not Require That Contributory Negligence Be Pleaded When It Appears in the Plaintiff's Testimony and the United States Court of Appeals for the District of Columbia Erred in Failing to Decide That the District Court Should Have Instructed the Jury on Contributory Negligence	19
Conclusion	21

Cases Cited

Brown v. Capital Transit Company, 75 U. S. App. D. C. 337, 127 Fed. (2d) 329 13
Brown v. Dorney Park, 167 Fed. (2d) 453 ..... 9, 19

PAGE

Farina v. First National Bank, 72 Ohio App. 109, 51 N. E. (2d) 18
Gray v. Baltimore & O. R. Company, 24 F. (2d) 671 ..... 9, 16
Hook v. National Brick Co., 150 Fed. (2d) 184 19
J. Maury Dove Company v. Cook, 59 App. 61, 32 Fed. (2d) 957 ..... 9, 20
Jaquette v. Capital Traction Co., 34 App. 51 8
Jesionowski v. Boston & M. R. R., 329 U. S. 452, 67 Supreme Court Rep. 401 ..... 8, 12
Johnson v. United States, 333 U. S. 46, 68 Supreme Court Rep. 391 ..... 8, 12, 14, 15
King v. Davis, 54 App. D. C. 239 ..... 8, 16
Kramer v. Mills Lumber Company, 24 Fed. (2d) 313 9
Pistorio v. Washington Railway & Electric Company, 46 App. D. C. 485 ..... 8, 17
San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 32 S. Ct. 399 18
Sweeney v. Erving, 228 U. S. 233, 33 Supreme Court Rep. 416 ..... 8, 18
Washington Loan and Trust Company v. Hickey, 78 U. S. App. D. C. 59, 137 Fed. (2d) 677 13
Woolworth v. Williams, 59 App. D. C. 347, 41 Fed. (2d) 970 19

IN THE

Supreme Court of the United States

October Term, 1949

No. .....

SAFEWAY STORES, INC., a Corporation,
Petitioner,

v.

ELIZABETH WEST, VESTER WEST,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petition of Safeway Stores, Inc., a Corporation, for a writ of certiorari to the United States Court of Appeals for the District of Columbia, entered on the 23rd day of January, 1950, affirming a judgment against your petitioner and in favor of the respondents in the sum of Forty-five Thousand Dollars ($45,000.00) entered in the United States District Court for the District of Columbia on the 6th day of January, 1949, respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED

Your petitioner, on the 28th day of June, 1945, and a long time prior thereto, operated a store at 1613 Montello Avenue, N. E., and on this day the respondent, Elizabeth West, opened a screen door with the intention of entering the store. As she started to go in, a lady was coming out with a baby in a stroller and she stepped back to allow the lady to pass, and as she held the door open the spring broke and struck her in the eye.

Mrs. West stated that she had used the screen door before and opened the door normally and walked in, but she did not remember how she opened the door on that particular day. All she remembered was that she held the door open but in what position she could not say. She knew that there was a spring on the door and that she had a spring on her own screen door at home and they looked alike (R. 13-21).

A Mrs. Margaret Howes, a witness for the respondent, stated that she was familiar with the store and was a customer in the store on the morning of June 28, 1945, and she was accompanied by her little baby who was transported in a stroller. She went to the store about 9:00 A.M. that morning and as she was leaving the store Mrs. West was coming in and Mrs. West stepped back and held the door open while she pushed the stroller down the step, and as she was pushing it down the step she heard a snap and a zinging sound and heard Mrs. West scream. She saw the spring fly back and bounce up on the screen door. She stated that she informed the manager, Mr. Weaver, of the fact that the spring had broken on the door and hit Mrs. West in the eye. The spring was a metal spring which hooked onto the side of the door and to the door jamb and that the spring was hanging to the screen door where it had broken off and it was on the screen door when she saw it. She stated that the

spring was broken at the end and that it was rusty but did not call it to the manager's attention (R. 21-27).

On cross-examination, Mrs. Howes stated that she went to the store two or three times a week and that on this particular morning she went to the store about 9:00 A.M. and saw nothing wrong with the door or spring as she went in. She saw nothing wrong with the spring as she was coming out, and that she had screen doors at her home and thought that she had the same type springs on the doors. She denied that Mrs. West pushed the screen door back against the wall. She stated that the spring was broken at the end where it snapped right off. She didn't pay too much attention to it but just looked at the end and saw that it had broken off (R. 27-30).

The following questions and answers, which were put to the witness, appear on page 31 of the record:

"By Mr. Doherty:
Q Now, on the question of the opening of this door, have you talked to anybody since the other proceeding that was had in this case on the 16th day of December, 1948? Have you discussed your testimony with anybody since that time? A Just to my family.
Q Nobody else at all? A To friends.
Q Have you discussed it with any party to this suit?
A No.
Q Your counsel? A No.
Mr. Doherty: I am now referring to page 109 of this record (indicating).
By Mr. Doherty:
Q I will ask you whether or not this was not your testimony on the 16th day of December, 1948, this past month.
'Q. Now, this particular day you heard a crack of some kind, is that what you heard? And your answer was: 'Yes.'
'Q She had pushed the door all the way back? Way back?' 'A Yes.'
'Q Was it back against the building? 'A Yes.'
'Q Just about?'

'A Yes.'
Was that your testimony at that time? A Well, I guess so."

The following questions and answers appear on page 33 of the record:

"By Mr. Doherty:
Q Did you read the original of this statement before you signed it? A Yes.
Q You had a notation that you have read it, the statement of one page and it is true? A Yes.
Q Now, in that statement didn't you put in there, this statement, 'She pulled the screen door open as far as it would go.' Is that what you told Mr. Briggs at that time? A Well, I guess so, if it is in there.
Q And that would be in accord with the same testimony that you gave in December, just a month ago, right over here in another court; But now you say that isn't so, that you didn't—that she didn't open the door as far as it would go and back up against the wall, as you previously testified. A I really don't remember, if I saw that—
Q You wouldn't deny you said it, would you? A No.
Q How long did you stay there after this accident occurred? A Oh, I guess about twenty minutes or something like that.
Q Waited until the ambulance came? A No, they took her inside and then I went on home.
Q And when did you look at the spring? A Well, after they revived her and asked her where she lived and asked me where I lived, and my name, and then I went over and looked at it.
Q And you inspected it? A Yes.
Q Did you look down at the end where it had broken? A Yes.
Q Was there another little part left on the door jamb, on the eye—the eye was still there, wasn't it, with the screws? A Yes."

The respondent, Vester West, testified that he went into the store approximately twice a week and used the screen doors and that he did not notice anything wrong

with them. He had used the screen door the Saturday prior to the accident and the door worked properly at that time (R. 36).

A motion was made at the close of the respondents' case for a directed verdict on the ground that no negligence of any kind was shown on the part of the Safeway Stores and that the doctrine of res ipsa loquitur would not apply (R. 38). This motion was denied (R. 50-51).

The petitioner produced evidence that the store in question was closed down for approximately three (3) weeks in order that it might be remodeled in May of 1945 and that it was remodeled under and by virtue of a contract with Edison Crawford Bittenbender and he received Twenty-one Hundred Fifty-one Dollars and Eighteen Cents ($2151.18) for remodeling the store, and that new coil springs were placed on the screen doors at that time.

Mr. Bittenbender testified that he could not tell from looking at a spring whether there was a defect of any kind in it. The spring is put on the door and pulled back and forth and if the spring doesn't break that would be the only test as to whether the spring was bad or good (R. 53-58).

On cross-examination, he stated that the only inspection he made consisted of pulling the door open to see if the door would close properly and that the spring didn't have too much tension on it. He stated further that rust will not hurt the springs. (R. 58-62).

On re-direct examination, he stated that when the springs get a little water on them, or rust as you would say, and you pull it back and forth constantly, like it is on a screen door, it would give, and instead of putting it away on the front, when it comes to half way, we put a new spring on there. He stated further that the metal was treated for rust (R. 63).

Charles A. Riggs stated that he was employed by E. C. Bittenbender in May of 1945 and was in charge of the remodeling of the store at 1613 Montello Avenue, N. E. He stated that the screen doors were remodeled and placd in first class condition under his supervision and new springs were put on the doors at that time. He identified the type of the spring which was used on the door which he said was placed near the center of the door about waist high. He stated that there is, as a rule, a cross-rail about the center of the door and that he always hooks the spring in the center of the rail, which would be about waist high, and that was the proper place to put it. He stated that there was no special way of checking the spring other than to open the door backward and forward to its fullest extent and see that the spring works the door and doesn't work too much of a strain on the springs so that it doesn't slam the door too hard. He stated that when the spring is used quite a bit and gets old it will stretch out so that it hasn't any recoil and not strength enough to close the door. He stated that he saw part of the spring that was broken and that he did not know what caused it to break and that he didn't have the slightest idea. He stated that the piece that was brought to his shop was about the size of the piece that was shown him in the Court room and that the piece that was shown him soon after the accident was not rusty (R. 64-67).

It was testified to that Frank Weaver, the manager of the store in June of 1945, had died in July of 1947 (R. 72-79).

At the close of all the evidence the petitioner renewed his motion for a directed verdict based upon the original ground given and further that if there was any inference of negligence by reason of the happening of the accident that it had overcome this negligence by direct evidence (R. 81).

The Court stated that the screen door and the spring were both matters over which the defendant had complete

control and that the plaintiff had no control of it, and, on page 85 of the record, this motion was denied. The Court denied the motion and indicated that the burden of proof, where res ipsa loquitur is relied upon, is upon the defendant to show that there was no negligence.

The Court permitted the case to go to the jury under the doctrine of res ipsa loquitur, and plaintiffs' instruction No. 5, covering the doctrine of res ipsa loquitur, was read to the jury (R. 9).

The petitioner asked for an instruction on contributory negligence, defendant's instruction No. 5, (R. 11) and this instruction was denied (R. 11).

The jury found in favor of the plaintiff and a motion to set aside the judgment and enter judgment for the defendant and/or grant a new trial was denied on the 9th of February, 1949 (R. 6-7).

The petitioner, in its brief in the United States Court of Appeals, relied upon nine (9) separate errors made by the trial Court, but the only point referred to in the opinion was that which covered the application of the doctrine of res ipsa loquitur.

In the argument in the United States Court of Appeals, counsel for the respondents stated that the petitioner was claiming error in the refusal of the trial Court to allow an instruction on contributory negligence and that it had not been pleaded. Judge Bennett Champ Clark, the presiding Judge, then said that if the petitioner had not pleaded contributory negligence then what complaint did it have?

THE BASIS OF THE COURT'S JURISDICTION

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended, Title 28 U. S. C. A., sec. 1254 (1).

The date of the judgment sought to be reviewed is January 23, 1950 (R. 108).

QUESTIONS PRESENTED

1. (a) Was there a correct interpretation by the United States Court of Appeals for the District of Columbia of the Doctrine of res ipsa loquitur as applied in the District of Columbia and in other Federal Circuits?

(b) Was there a correct application of that doctrine to the facts in this case?

2. (a) Did the United States Court of Appeals for the District of Columbia err in failing to pass upon petitioner's request for an instruction on contributory negligence?

(b) Did not the facts of this case require that the question of contributory negligence be decided by a jury?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

(1) The decision of the United States Court of Appeals for the District of Columbia Circuit in this case on the question of res ipsa loquitur is in conflict with the applicable decisions of this Court in

Johnson v. *United States,* 333 U. S. 46, 68 Supreme Court Rep. 391
Jesionowski v. *Boston & M. R. R.,* 329 U. S. 452, 67 Supreme Court Rep. 401
Sweeney v. *Erving,* 228 U. S. 233, 33 Supreme Court Rep. 416

The decision in this case is in direct conflict with the decisions of the United States Court of Appeals for the District of Columbia:

Jaquette v. *Capital Traction Co.,* 34 App. 41
Pistorio v. *Washington Railway & Electric Company,* 46 App. D. C. 485
King v. *Davis,* 54 App. D. C. 239

The decision of the United States Court of Appeals for the District of Columbia is in conflict with the various Circuit Courts of Appeals in the following decisions:

Gray v. *Baltimore & O. R. Company,* 24 F. (2d) 671
Kramer v. *Mills Lumber Company,* 24 Fed. (2d) 313
Brown v. *Dorney Park,* 167 Fed. (2d) 453

In the case of *Johnson* v. *United States,* 333 U. S. 46, 68 Supreme Court Rep. 391, this Court left open the question of the application of the doctrine of res ipsa loquitur where it was shown that the injured person was an actor in the occurrence.

(2) The decision of the United States Court of Appeals for the District of Columbia in this case in failing to pass upon the instruction of contributory negligence for the supposed reason that it was not pleaded is in conflict with its own decisions:

J. Maury Dove Company v. *Cook,* 59 App. 61, 32 Fed. (2d) 957

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia should be granted.

CORNELIUS H. DOHERTY
1010 Vermont Avenue N. W.
Washington, D. C.
Attorney for Petitioner

In The

Supreme Court of the United States

October Term, 1949

No. .....

Safeway Stores, Inc., a Corporation,
Petitioner,

v.

Elizabeth West, Vester West,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the District of Columbia has not been officially reported at the time this is written, but is printed in the record (R. 108).

SPECIFICATION OF ERRORS

(1) The United States Court of Appeals for the District of Columbia erred in holding that this was a proper case for the application of the doctrine of res ipsa loquitur

and that it should have required the respondents to prove negligence on the part of the petitioner especially where the record discloses that the respondent was an actor in the occurrence, and that she and her witnesses were the only persons who had actual knowledge of what occurred.

(2) The United States Court of Appeals for the District of Columbia erred in holding that the doctrine of res ipsa loquitur applied where the record disclosed that the respondents' witnesses stated that the spring appeared to be working properly prior to the accident and that because of the mere breaking of the spring there was an inference of negligence.

(3) The United States Court of Appeals for the District of Columbia erred in refusing to consider the refusal of the trial Court to instruct the jury on contributory negligence. The action of the United States Court of Appeals for the District of Columbia being due to a misapplication of the law covering the necessity of pleading contributory negligence under the Rules of Civil Procedure for the District Courts of the United States.

ARGUMENT

The United States Court of Appeals for the District of Columbia Misconceived the Law of Res Ipsa Loquitur as Stated in the Applicable Decisions of this Court and Misapplied That Law to the Facts in This Case

In the briefs of both parties in the United States Court of Appeals for the District of Columbia, reference was had to the cases of *Jesionowski* v. *Boston & M. R. R.*, 329, U. S. 452, 67 Supreme Court Rep. 401, and *Johnson* v. *United States*, 333 U. S. 46, 68 Supreme Court Rep. 391, but the United States Court of Appeals, in its decision, made no reference whatever to these decisions.

The United States Court of Appeals for the District of Columbia relied upon the previous decisions of that Court in *Washington Loan and Trust Company* v. *Hickey,* 78 U. S. App. D. C. 59, 137 Fed. (2d) 677, and *Brown* v. *Capital Transit Company,* 75 U. S. App. D. C. 337, 127 Fed. (2d) 329.

In the Hickey case a screen fell from a window on the sixth or seventh floor of a building owned and operated by the defendant and the plaintiff was not in a position to produce witnesses as to the cause of the falling and the Court rightly applied the doctrine of res ipsa loquitur for the screen was in the exclusive possession of the defendant, and, if not, it was in a position to produce testimony as to who had the possession and control of the screen.

In the Brown case, immediately following the statement which is contained in the opinion of the United States Court of Appeals for the District of Columbia, is the following:

> "The rule is so stated by the Supreme Court in Sweeney v. Erving, 228 U. S. 233. Where, as here, it is a matter of surmise that the damage was due to a cause for which the defendant is liable, the doctrine is inapplicable. If causes other than the negligence of the defendant might have produced the accident, the plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence. Here the sum and substance of appellant's evidence is that an injury occurred.
>
> "We are of opinion that the trial Court, in directing the verdict, properly took away from the jury the opportunity to guess and speculate, as they must have done to reach a verdict in this case."

The only testimony that was available concerning the happening of the accident and the subsequent injury was in the sole possession and control of the female respondent and her witnesses. She was an actor in the occurrence

and whether she opened the door normally or placed it back to its fullest extent against the wall at an angle of One Hundred Eighty Degrees (180°) or not were all facts which were presented in the respondents' case. If the Court was of the opinion that there was sufficient facts to go to the jury on the question of the petitioner's negligence it should have permitted it to go to the jury under proper instruction on general negligence and not upon the sole instruction covering the doctrine of res ipsa loquitur and instructing the jury that it was necessary for the petitioner to overcome an inference of negligence.

The Court could have permitted this matter to go to the jury under proper instruction on the negligence of the petitioner and the contributory negligence of the female respondent.

In the Johnson case, the Court, at page 48, said:

> "The rule of res ipsa loquitur applied in Jesionowski v. Boston & Maine R. Co., supra, means that 'the facts of the occurrence warrant the inference of negligence, not that they compel such an inference.' Sweeney v. Erving, 228 U. S. 233, 240, 33 S. Ct. 416, 418, 57 L. Ed. 815. We need not determine what the result would be if it were shown that petitioner was pulling on the rope when the accident happened. For the uncontradicted evidence is that he was not pulling on the rope but was bending over coiling it on the deck. A man who is careful does not ordinarily drop a block on a man working below him. Some external force might conceivably compel him to do so. But where, as here, the injured person is not implicated (Jesionowski v. Boston & Maine R. Co., supra), the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent. In short, Dudder alone remains implicated, since on the record either he or petitioner was the cause of the accident and it appears that petitioner was not responsible."

The respondent definitely was an actor in this occurrence and this Court, in the above statement taken from the

opinion in the Johnson case, leaves this particular matter open for future decision.

Unless some definite rule is stated by this Court covering each and every instance for the application of the doctrine of res ipsa loquitur, the District Courts and the United States Court of Appeals for the District of Columbia will enlarge upon and misapply the doctrine until all that will be necessary to be shown in each and every case will be that the person has been injured and will, in effect, change the burden of proof which is now upon the plaintiff to the defendant.

The Doctrine of Res Ipsa Loquitur Is Not Applicable When the Negligence Is Known

The respondents, in their complaint, stated that the petitioner maintained said screen doors and the metal attachments thereon, including said springs, in such a negligent and careless manner as to cause the said metal springs to break off when said screen door was extended, thereby causing the same to drop off or separate and strike the plaintiff * * * (R. 3). They attempted to prove these facts by showing the breaking of the spring, the fact that it appeared to be rusty and that the spring was placed on the door approximately face high to the female respondent. The door was shown to have been used a short time prior thereto by one of the respondents' witnesses. There was no testimony to show what actually caused the spring to break or where there was any negligence on the part of the petitioner.

Mr. Justice Frankfurter, dissenting in part, in the Johnson case, at page 53, made the following statement:

> "But I do not believe that res ipsa loquitur is applicable here. It is, after all, a 'rule of necessity to be invoked only when necessary evidence is absent and not readily available.' See Cooley, Torts, 4th Ed., 480. Here the evidence as to the cause of peti-

> tioner's injuries was admittedly available, and it would seem to follow that since what actually happened could have been adjudicated, it should have been adjudicated. Therefore, I would affirm the judgment of the court below but modify its mandate so that there may be a new trial on this issue and an adjudication based upon an adequate determination."

The petitioner had no knowledge whatever concerning the happening of the accident except that which was conveyed to it by the respondents and their witnesses.

In the case of *Gray* v. *Baltimore & O. R. Company,* 24 Fed. (2d) 671, the Court, at page 673, made the following statement:

> "We are of opinion that the maxim 'res ipsa loquitur' has no application in this case. Negligence is never presumed. Under the maxim 'res ipsa loquitur', negligence is only inferred from the surrounding circumstances in those cases where the act of negligence is not known. If the negligence is known, there is no justification for the drawing of inferences. In this case, the cause of the open switch was a matter of common knowledge, and was fully known to the plaintiff. The switch was found open into the siding. The derailing of the cars was caused by the derailing device, properly in place upon the switch rails. The sawed lock was found soon after the accident near the switch. The negro was apprehended, convicted, and sent to prison, because he sawed the lock and opened the switch. The plaintiff in no way challenges those facts, but, on the contrary, he bases his third count upon the failure of defendant to guard the switch against the negro. The switch was taken under the control of the negro at the time he sawed the lock, and from that time until the wreck it cannot be said that it was solely under the control of the defendant."

In the case of *King* v. *Davis,* 54 App. D. C. 239, the Court said, at page 242:

> "It is urged by appellant that the doctrine of res ipsa loquitur should be applied in this case. That

doctrine may be invoked only where the facts of the occurrence warrant the inference of negligence, and the pleader, because of the nature of the case, is not able to point out the specific act which caused the injury complained of. Moore v. Clagett, 48 App. D. C. 410, 415. But where, as here, the declaration alleges the precise acts upon which the case is predicated, namely, the service of the veal with knowledge, actual or constructive, that it was unfit for human consumption, the doctrine has no application. The pleader knew the acts of negligence on which she relied, and she was required to prove them, or some of them, without the aid of the presumption which flows from the application of the doctrine of res ipsa loquitur. **Moore v. Clagett, supra.**"

In the case of *Pistorio* v. *Washington Railway & Electric Company*, 46 App. D. C., at page 485, the Court made the following statement:

"The plaintiff was riding in an open car facing in the direction the car was going. It is alleged in the declaration how and where the collision occurred, and the negligence of defendants is generally charged. All the circumstances tending to establish negligence on the part of defendants were adduced by the testimony of plaintiff and her witnesses in her case in chief. Nothing was left for defendants but rebuttal. To such a case the rule of res ipsa loquitur has no application. Where the plaintiff assumes to allege the facts constituting negligence, he is bound to prove them, and no inference of negligence arises from the happening of the accident. 'It is sufficient for him to charge in general terms that he was injured while being carried as a passenger, as the result of the negligence of the carrier. But when the plaintiff chooses to allege in his petition the specific acts of negligence of which he complains, he assumes the burden of proving them, and as in other cases must recover, if at all, upon the negligence pleaded.' Hamilton v. Metropolitan Street R. Co., 114 Mo. App. 504, 89 S. W. 893, quoted with approval in Jaquette v. Capital Traction Co., 34 App. D. C. 41, 44, 5 L. R. A. (N. S.) 407. The same rule applies where negligence is alleged in general terms, but the plaintiff voluntarily assumes the burden

of proving it. 'This presumption only arises in the absence of evidence of the circumstances out of which the negligence of defendant may be ascertained.' Sullivan v. Capital Traction Co., 34 App. D. C. 358, 374."

The Instrumentality Causing the Injury Was Not In the Exclusive Control of Defendant

Your petitioner referred, in its brief in the United States Court of Appeals for the District of Columbia, to the case of *Farina* v. *First National Bank,* 72 Ohio App. 109, 51 N. E. (2d), page 36, where a customer of a bank was using a revolving door in leaving the bank when it collapsed and injured her and she endeavored to rely upon the doctrine of res ipsa loquitur, and the Court made the following statement:

"This door, as well as doors of like design, did not and does not operate itself. It was made available by the bank, but was not being operated by it. By the plaintiff's own testimony she was operating the door when a wing collapsed. She had to exercise some force to procure an exit from the banking room. In fact, unless another person was within the door at the time, she was the sole agency which caused it to revolve. This being true, then, at the time of injury, the bank had no control thereover."

This decision is in accord with the decisions of this Court in the case of *San Juan Light & Transit Co.* v. *Requena,* 224 U. S. 89, 32 S. Ct. 399, and *Sweeney* v. *Erving,* 228 U. S. 233, 33 S. Ct. 416.

The Instrumentality Causing Injury Could Have Caused the Injury Without Negligence of the Defendant

It is not known what caused the spring to break. There is no evidence that the spring was caused to break by reason of any defect which might have been apparent under any circumstances to the defendant upon an examination by it.

In *Hook* v. *National Brick Co.*, 150 Fed. (2d) 184, the Court referred to a statement in Restatement of the Law, Vol. Torts, Chap. 12, Par. 300, as follows:

> " 'A failure to make an inspection does not create liability unless the inspection, if made, would have disclosed the particular defect which makes the use harmful to the other. * * * It is sometimes true that those who use certain instrumentalities are under a duty to make reasonable inspection thereof. The duty of inspection is not, however, ordinarily an independent duty upon which liability is based, but is a duty, the performance of which is a condition precedent to a reasonable use of the instrumentality. The actor's negligence lies in his act of using the defective instrument without adequate inspection, not in his omission to perform his duty of inspection.' "

The same effect is *Brown, et al* v. *Dorney Park Coaster Co., Inc.*, 167 Fed. (2d) 433.

In the case of *Woolworth* v. *Williams*, 59 App. D. C. 347, 41 Fed. (2d) 970, the Court said that the proprietor of a store is merely under a duty of exercising reasonable care to keep his store in a safe condition and is not an insurer of their safety while in the store.

To require of the petitioner to overcome an inference of negligence where it is merely shown that the party is injured would make your petitioner an insurer of the safety of customers in its store.

The Rules of Civil Procedure for the District Courts of the United States Do Not Require That Contributory Negligence Be Pleaded When It Appears in the Plaintiff's Testimony and the United States Court of Appeals for the District of Columbia Erred in Failing to Decide That the District Court Should Have Instructed the Jury on Contributory Negligence.

It is true that Rule 8 (c) of the Federal Rules of Civil Procedure states that contributory negligence is an affirmative defense and should be pleaded, but this in no way

changes the law which existed in the District of Columbia and elsewhere that where the contributory negligence appears in the plaintiff's own case then it may be taken advantage of without the necessity of pleading.

In the case of *J. Maury Dove Co.* v. *Cook,* 59 App. D. C. 61, the Court, at page 62, said:

> "The sole question before us is whether under the facts of this case as disclosed by plaintiff's evidence, defendant not having pleaded contributory negligence, the question of contributory negligence should have been submitted to the jury. Where the question of contributory negligence is not raised by plea of defendant, it is the almost universal rule that the court may direct a verdict if plaintiff's evidence discloses contributory negligence as matter of law, but that if plaintiff's evidence merely tends to show contributory negligence the question is for the jury."

The respondents' evidence indicated that the female respondent pushed the door back against the wall which places an unusual strain upon the spring and this may have been the cause of the breaking of the spring and the subsequent injury of the female plaintiff.

The District Court was asked to instruct on contributory negligence in accordance with defendant's instruction No. 5 (R. 11), and this was denied. The United States Court of Appeals failed to pass upon the right of your petitioner to have an instruction under the theory of contributory negligence on the part of the female respondent, and this failure to pass upon this instruction was indicated by the Court at the time of argument to be because of the failure of petitioner to plead contributory negligence.

The petitioner had no facts nor proof of its own upon which to base a plea of contributory negligence and this information or evidence appeared only in the plaintiffs' case in chief, and your petitioner was entitled to have an instruction on contributory negligence.

CONCLUSION

The record clearly discloses that the spring which caused the injury to the plaintiff was not in the exclusive possession and control of the petitioner at the time that the female respondent was injured. The record indicates that the female respondent was an actor in the occurrence and did have control to some degree of the instrumentality which caused her injury. The record indicates that the evidence of the cause of the female respondent's injuries were available and the respondents and their witness were the only ones who had actual knowledge of the cause of the injury, and having pleaded and attempted to prove the negligence of the petitioner it was highly improper to allow this matter to go to the jury on the doctrine of res ipsa loquitur with an inference to be overcome by the petitioner who had no knowledge concerning the actual happening of the accident.

If the case were permitted to go to the jury at all it should have gone to the jury under proper instructions on the question of the negligence of the petitioner.

The record indicates clearly that the female respondent was in control of the instrumentality which caused her injury and that it may have been her negligence in opening the door beyond a normal limit which caused the spring to stretch and break, and that the Court should have instructed the jury on the question of negligence and the contributory negligence of the respondent.

It is respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia in this case is in conflict not only with the decisions of this Court but with the decisions of the majority of the Circuit Courts where these questions have arisen; that the questions presented in this petition are of extreme importance and wide application to all matters pertaining

to actions based on negligence, and that the writ of certiorari should be granted in this case in order that the questions presented herein may be clarified and settled by this Honorable Court.

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Petitioner